

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-15051-smb

- - - - -x

In the Matter of:

Case No.

DREIER, LLP, Debtor.

08-15051-smb

- - - - -x

In the Matter of:

Case No.

MARC S. DREIER, Debtor.

09-10371-smb

- - - - -x

In the Matter of:

FEDERAL INSURANCE COMPANY, Plaintiff,

ADV Case No.

-against-

DREIER, LLP, et al., Defendants.

09-01453-smb

- - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

September 23, 2010

10:24 AM

B E F O R E:

HON. STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

The Gardi Parties' Motion for Leave to take Deposition of Marc  
S. Dreier (08-15051)

U.S. Trustee's Objection to Proofs of Claim 374 and 440 (08-  
15051)

Status Conference (08-15051)

Pre-Trial Conference (09-01453)

The Gardi Parties' Motion for Leave to take Deposition of Marc  
S. Dreier (09-10371)

Transcribed by: Dena Page

A P P E A R A N C E S :

ALSTON & BIRD, LLP

Attorneys for the Gardi Parties

1201 West Peachtree Street

Atlanta, GA 30309

BY: JOHN E. STEPHENSON, JR., ESQ.

ALSTON & BIRD, LLP

Attorneys for the Gardi Parties

90 Park Avenue

New York, NY 10016

BY: ALEXANDER S. LORENZO, ESQ.

KLESTADT & WINTERS, LLP

Attorneys for Official Committee of Unsecured Creditors

292 Madison Avenue

17th Floor

New York, NY 10017

BY: SEAN C. SOUTHARD, ESQ.

LAMONICA HERBST & MANISCALCO LLP

Attorneys for Chapter 7 Trustee Salvatore LaMonica  
3305 Jerusalem Avenue  
Wantagh, NY 11793

BY: JACQULYN S. GIUNTA, ESQ.

DIAMOND MCCARTHY LLP

Attorneys for Chapter 11 Trustee Sheila Gowan  
620 Eighth Avenue  
39th Floor  
New York, NY 10018

BY: STEPHEN T. LODEN, ESQ.

HOWARD D. RESSLER, ESQ.

TROUTMAN SANDERS LLP

Attorneys for Federal Insurance Company  
405 Lexington Avenue  
New York, NY 10174

BY: BRETT D. GOODMAN, ESQ.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

THE CLERK: Dreier.

MR. LODEN: Good morning, Your Honor.

THE COURT: Good morning.

MR. LODEN: Stephen Loden of Diamond McCarthy on behalf of the Chapter 11 Trustee Sheila Gowan who is also present this morning, as well as my partner, Howard Ressler.

MR. STEPHENSON: John E. Stephenson, Your Honor, of Alston & Bird for the Gardi parties. Mr. Gardi's also in the courtroom.

THE COURT: How do you do?

MR. SOUTHARD: Good morning, Your Honor, Sean Southard of Klestadt & Winters for the committee.

MR. LODEN: Your Honor, there's a couple of matters on the calendar this morning. With the Court's permission, I propose that we take up Mr. Gardi's unopposed motion first, and then the adversary proceeding status conference, and then the case status conference --

THE COURT: Okay.

MR. LODEN: -- to wrap up any loose ends.

THE COURT: Go ahead.

MR. STEPHENSON: Your Honor, we have pending before you, as you see from the papers, an unopposed motion to take the deposition of Marc Dreier in the Federal Correctional Institution in Sandstone, Minnesota. His testimony is

1 necessary, and the parties agree with respect to the pending  
2 objections --

3 THE COURT: Okay.

4 MR. STEPHENSON: -- in contested matter. So we'd ask  
5 for an order, and then we would work out with the warden at the  
6 penitentiary, obviously, the timing of that, which would also  
7 be geared to the related matters we'll talk about on the status  
8 conference.

9 THE COURT: Yeah, I saw an unusual motion that I know  
10 is on for a couple of weeks from now, but we can talk about  
11 that.

12 MR. STEPHENSON: Right.

13 THE COURT: All right, does anyone want to be heard in  
14 connection with the motion for leave to take Mr. Dreier's  
15 deposition?

16 The record should reflect there's no response. The  
17 motion is granted. As I recall, one of the arguments was he  
18 wasn't a client -- or, Mr. Gardi and -- well, the Gardi parties  
19 were not clients of the firm, so certainly his testimony is  
20 relevant to that. So that motion is granted; you can submit an  
21 order.

22 MR. STEPHENSON: Thank you.

23 MR. LODEN: Your Honor, the next matter is the -- what  
24 we've been referring to as the Chubb adversary proceeding. As  
25 the Court may recall, that's the adversary proceeding whereby

1 Chubb and Federal Insurance Company sought to rescind the  
2 malpractice policy that was issued to the Dreier firm.

3 As the Court is aware, we have reached a settlement  
4 with Chubb of that adversary as well as the counterclaims that  
5 we have asserted against Chubb. That settlement is related to  
6 a settlement -- excuse me -- to a settlement that is being  
7 pursued in the 360networks Chapter 11 case as well in this  
8 court -- or, in the Southern District, and that is a settlement  
9 between 360networks and Norm Kinel. Mr. Kinel was the Dreier,  
10 LLP partner who was responsible for the 360networks retention.  
11 360networks has claims against Mr. Kinel, and Mr. Kinel has  
12 asserted that those claims are covered by the policy which is  
13 the subject of the rescission adversary before the Court right  
14 now. So resolution of those 360/Norm Kinel necessarily relates  
15 to and should precede resolution of the rescission litigation.  
16 So that's been what the holdup is in terms of us being able to  
17 get a 9019 motion on file in this court to resolve the current  
18 adversary proceeding.

19 We're in close contact with counsel for 360networks  
20 and for Mr. Kinel. They tell us that they're working through  
21 the issues. They actually had an initial hearing on their  
22 proposed agreement which was rejected by the Court in the 360  
23 case. So they're going back to the drawing board. They're  
24 still committed to the resolution, and they're trying to rework  
25 it to satisfy the Court's concerns there.

1           So this is probably the fourth or fifth time that this  
2           status conference has been pushed off and then held and then  
3           pushed off again. Unfortunately, I'm asking, for these  
4           reasons, for another adjournment today. And if the Court would  
5           be so inclined, what I would suggest is that we put this  
6           adversary on a suspense calendar.

7           THE COURT: We don't have a suspense calendar.

8           MR. LODEN: I thought you might say that.

9           THE COURT: So why'd you ask?

10          MR. LODEN: If that's -- well, no harm in asking, I  
11          suppose.

12          THE COURT: I suppose.

13          MR. LODEN: If that's not possible, then set this out  
14          sufficiently far away.

15          THE COURT: Right.

16          MR. LODEN: I don't think six weeks is going to be  
17          enough time again.

18          THE COURT: Well, why don't we do this? Look, I'll  
19          give you a date, but if you haven't gotten a resolution of the  
20          issues in 360, just write a letter explaining that and asking  
21          for an adjournment to a later date.

22          MR. LODEN: That's acceptable, Your Honor.

23          THE COURT: Let me put it out a couple of months.  
24          I'll put it out to December 7th, okay?

25          MR. LODEN: Okay.



1           Finally, Your Honor, in terms of the overall case  
2           status conference, as the Court referred earlier, Mr. Gardi has  
3           filed a motion to join JANA with the claims litigation, and as  
4           the Court may have saw yesterday, the Chapter 11 Trustee and  
5           the Chapter 7 Trustee filed a joint statement in support of the  
6           joinder of JANA solely for efficiency purposes.

7           THE COURT: I had a question about the procedure. I  
8           understand why you want JANA in here, but I would have thought  
9           that the Gardi parties would have commenced a proceeding  
10          somewhere simply to rescind the settlement agreement on the  
11          grounds that it was unauthorized and induced by fraud, not  
12          necessarily JANA's fraud, but certainly it was unauthorized.  
13          And I assume that you could either join the trustee or the  
14          trustees could just agree to be bound by whatever another Court  
15          decides.

16          MR. STEPHENSON: Well, as the Court will recall, we  
17          moved to lift stay for that very purpose, to bring an action  
18          that would include the trustees.

19          THE COURT: I thought you moved to lift stay to follow  
20          the money.

21          MR. STEPHENSON: Well, we did, but the issues -- we  
22          discussed in that context --

23          THE COURT: Okay, let's -- first of all, you could  
24          probably bring that lawsuit here because it's related -- it's  
25          certainly related to this bankruptcy.

1 MR. STEPHENSON: Funny that you should mention that,  
2 Your Honor. Last night, we filed an adversary proceeding that  
3 is effectively a 7001, 2, and 9.

4 THE COURT: And what relief are you seeking?

5 MR. STEPHENSON: Judicial determination from this  
6 Court about the rights of the parties as it relates to the  
7 interest in this proof of claim which turns on whether the  
8 fraudulent settlement agreement between the Gardi parties and  
9 JANA is enforceable or not.

10 THE COURT: Well, why don't you just bring a  
11 rescission claim?

12 MR. STEPHENSON: In a separate court?

13 THE COURT: Well, you can bring it here, presumably.

14 MR. STEPHENSON: Well, that's --

15 THE COURT: If you're seeking rescission, that's one  
16 thing. But how can I determine what the relative rights of the  
17 parties are?

18 MR. STEPHENSON: Your Honor, you can and you must --

19 THE COURT: I know I must; at some point it must be  
20 determined.

21 MR. STEPHENSON: That's correct. That's correct. And  
22 what we've done by two independent vehicles is given the Court  
23 the option, each sufficient and independently supportable to  
24 either join JANA under 9021, which you have the authority to  
25 do, which in turn looks at Rules 19 and 20 for joinder.

1           THE COURT: Yeah, I understand. It just sounded  
2 strange to join them in a contested matter in which they're  
3 objecting to their claim. If you bring an adversary proceeding  
4 and you're seeking some sort of determination, which sounds to  
5 me like it should be a rescission claim, unless you want to  
6 ratify the agreement --

7           MR. STEPHENSON: No.

8           THE COURT: -- then we don't need it.

9           MR. STEPHENSON: We are seeking the Court's  
10 determination regarding the enforceability of that fraudulent  
11 settlement agreement. You could cast it --

12          THE COURT: But what are the issues that I'm going to  
13 determine in that case?

14          MR. STEPHENSON: The central issue in the objection  
15 filed by the trustee and the joinder --

16          THE COURT: Forget about the trustee. This is between  
17 you and JANA.

18          MR. STEPHENSON: Well, it is and it isn't. The  
19 trustee has raised as the central proposition to their  
20 objection to the proof of claim that the Gardi parties are not  
21 the proper parties to pursue proof of claim. The reason is,  
22 they contend -- and they may well be correct -- that that money  
23 doesn't belong to the Gardi parties; it belongs to JANA. JANA  
24 gave it to Dreier and was defrauded by Dreier. JANA had the  
25 risk of loss. JANA should be pursuing the proof of claim.

1           The Gardi parties filed their proof of claim expressly  
2           contingent on a determination by the court.

3           THE COURT:   If I decide what you just said --

4           MR. STEPHENSON:   Yes, sir.

5           THE COURT:   -- are you going to turn around and sue  
6           JANA?

7           MR. STEPHENSON:   Of course.

8           THE COURT:   So why don't you just sue to rescind the  
9           agreement, the settlement agreement with JANA or just sue them  
10          again. And when they raise the settlement, say it's  
11          unenforceable.

12          MR. STEPHENSON:   Here's the problem with that, and  
13          that's why we proceeded -- we filed the adversary proceeding.  
14          What should have happened, what the law provides rules to  
15          prevent, is that we be whipsawed by separate adjudications.

16          THE COURT:   I understand that. So sue in this court  
17          to re -- sue --

18          MR. STEPHENSON:   We --

19          THE COURT:   I haven't heard a rescission claim  
20          asserted. You want me to declare the rights of the parties --

21          MR. STEPHENSON:   We're asking that you declare the  
22          fraudulent settlement agreement to be unenforceable so that we  
23          have the freedom to sue JANA in another court.

24          THE COURT:   All right.

25          MR. STEPHENSON:   And we've cast it as a declaration of

1 the party's rights under the agreement.

2 THE COURT: You're free to sue JANA in another court  
3 right now, if you want to.

4 MR. STEPHENSON: Right, and pursue in this court the  
5 response for the trustees' objections and get two separate  
6 inconsistent results in either of those two cases.

7 THE COURT: Mr. Stephenson, I understand why you want  
8 the relief. I'm just questioning the procedural mechanism that  
9 you've selected to get it.

10 MR. STEPHENSON: Fair enough. We filed the adversary  
11 proceeding.

12 THE COURT: All right, remember, declaratory relief is  
13 discretionary. And if I conclude that there's some other way  
14 that you can get the same relief in a direct action with a  
15 declaratory judgment, I may decline to entertain it.

16 MR. STEPHENSON: Then the request for relief in the  
17 adversary proceeding that was filed last night could be cast  
18 both as a request for declaratory relief and an affirmative  
19 request that the Court rescind --

20 THE COURT: Okay.

21 MR. STEPHENSON: -- the fraudulent settlement  
22 agreement.

23 THE COURT: Okay.

24 MR. STEPHENSON: But the vehicle is present --

25 THE COURT: All right.

1 MR. STEPHENSON: -- to Your Honor's court.

2 THE COURT: So this motion that you made, do you want  
3 to just withdraw that motion?

4 MR. STEPHENSON: The motion to join?

5 THE COURT: On the -- yeah, on the objection.

6 MR. STEPHENSON: We're prepared to go forward on the  
7 adversary proceeding --

8 THE COURT: Yeah.

9 MR. STEPHENSON: -- if Your Honor would prefer.

10 THE COURT: I'm not going to decide this objection  
11 until we figure out -- well, I know that you have a separate  
12 claim that you're applying to the firm, and you'd have a proof  
13 of -- you'd have a right to a claim on that basis, whatever  
14 that amount might be.

15 MR. STEPHENSON: Right.

16 THE COURT: But --

17 MR. STEPHENSON: Right.

18 THE COURT: All right.

19 MR. STEPHENSON: It is true, Your Honor, that the  
20 trustees' objection will turn on the outcome of Your Honor's  
21 decision on whether to rescind the fraudulent settlement  
22 agreement. And so that issue is a threshold matter with  
23 respect to the trustees' objections, and should be litigated  
24 and determined, and then the adjudication of their objection --

25 THE COURT: It will be determined as one action.

1 Except JANA never filed a proof of claim, right?

2 MR. STEPHENSON: That's right, Your Honor. JANA  
3 never --

4 THE COURT: So you have a rooting interest in this  
5 one.

6 MR. LODEN: Not only did JANA never file a proof of  
7 claim, but we're led to believe that JANA made a strategic  
8 decision not to subject itself to this Court's jurisdiction for  
9 these reasons. So --

10 MR. STEPHENSON: He's led to that belief because we  
11 wrote them and said you should file a proof of claim before the  
12 bar date; the bar date is X, and they told us to pound sand.  
13 Which felt strategic at the time.

14 THE COURT: Well, I mean, I guess I have nationwide  
15 jurisdiction, and as long as it's within the subject matter of  
16 the court -- the subject matter jurisdiction of the court --  
17 we'll see what JANA says.

18 MR. STEPHENSON: Yeah, that's right. Good.

19 THE COURT: All right, so you filed the -- did you get  
20 a summons?

21 MR. STEPHENSON: It'll be issued, presumably, either  
22 tomorrow or Monday. It was filed last night.

23 THE COURT: All right. Unless I hear differently, I  
24 would suggest we just adjourn the claim objections to the dates  
25 set for the first pre-trial conference and summons.

1 MR. LODEN: That's perfectly fine, Your Honor. In  
2 fact, we've already reached agreement with Mr. Gardi's counsel  
3 to adjourn pending depositions and the like for that very  
4 reason, until we know --

5 THE COURT: All right.

6 MR. LODEN: -- whether JANA's going to be a party or  
7 not. So --

8 THE COURT: So do you want me to -- all right, why  
9 don't you let chambers know what the pre-trial conference date  
10 is when you get the summons issued.

11 MR. LODEN: Okay. Your Honor, on a connected note,  
12 the initial hearing, or the next hearing on the claims  
13 objection was set several weeks ago by the Court to occur on  
14 October 21st, and I had written to the Court shortly after that  
15 saying that I neglected to check my calendar and I'm not  
16 available that day --

17 THE COURT: Well, I will just adjourn everything to --

18 MR. LODEN: Right.

19 THE COURT: It's going to be more than thirty days.

20 MR. LODEN: It'll be more November, more than likely,  
21 I would think.

22 THE COURT: It will probably be at least forty-five  
23 days out.

24 MR. LODEN: Yes, sir. Okay, so the 21st is off, as  
25 well.



1 THE COURT: Yeah, just write and remind us.

2 MR. LODEN: Okay.

3 THE COURT: Why don't you just write a letter  
4 withdrawing without prejudice your motion to join JANA in the  
5 claim objection, okay?

6 MR. STEPHENSON: And Your Honor, I should alert you  
7 that the adversary proceeding that we filed last night has an  
8 ancillary claim for breach of contract against JANA because if  
9 the Court determines that the fraudulent settlement agreement  
10 is not in force, then we have right claims for breach against  
11 them that we would affirmatively sue. This Court can sever  
12 those and they could be sent elsewhere.

13 THE COURT: Yeah, I'm not sure I have jurisdiction  
14 over that, anyway.

15 MR. STEPHENSON: Correct, I understand. But they're  
16 brought so that no one says that we waived them in this  
17 pleading.

18 THE COURT: Okay. What's your adversary number,  
19 there?

20 MR. STEPHENSON: It is 10-3641 --

21 THE COURT: Okay.

22 MR. STEPHENSON: -- and 10-3642.

23 THE COURT: You filed two adversary proceedings.

24 MR. LODEN: The 7 and 11. In the Chapter 7 and the  
25 Chapter 11.

1 THE COURT: Oh, I see. All right. Probably could've  
2 filed --

3 MR. STEPHENSON: I have courtesy copies for the Court  
4 if you want.

5 THE COURT: Okay.

6 MR. STEPHENSON: Thank you.

7 THE COURT: All right, thanks. You ought to start  
8 thinking about consolidating the two adversary proceedings.

9 MR. STEPHENSON: I was going to ask Your Honor, at  
10 least for discovery purposes, if we could do that.

11 THE COURT: Why don't we wait until JANA shows up?

12 MR. STEPHENSON: Okay.

13 MR. LODEN: Yeah.

14 THE COURT: They might have a different view.

15 All right, anything else?

16 MR. LODEN: Your Honor, just briefly with respect to  
17 other happenings in the case, as I'm sure the Court has seen,  
18 Judge Batts in the District Court has --

19 THE COURT: He did.

20 MR. LODEN: -- affirmed your decision on GSO. The  
21 window to appeal to the Second Circuit is still open on that  
22 issue.

23 As the Court may not have seen is that there is a  
24 consensual dismissal of the Verition and trustee's agreement  
25 against --

1 THE COURT: I saw that. I get the same e-mails you  
2 do.

3 MR. LODEN: Oh, okay. Okay, great. So those  
4 dismissals were filed yesterday.

5 With respect to other matters, the Court has approved  
6 the retention of ASK, the ASK Firm for pursuit of trade  
7 preferences. The Phillips de Pury retention was approved for  
8 the art auction. The 363 sale procedures motion for the art  
9 auction is set for next week, a week from today. As the Court  
10 may have seen, we also filed adversary complaints against  
11 Amaranth and Patriot for avoidance actions. Other complaints  
12 are coming.

13 THE COURT: Okay.

14 MR. LODEN: So unless there are any questions, that's  
15 the status update for the Court today.

16 THE COURT: All right, what do you propose -- does  
17 any -- well, before we do that, does anybody else want to be  
18 heard in connection with the status of the cases?

19 Okay, the record should reflect there's no response.  
20 What do you propose for the next date for a status  
21 conference?

22 MR. LODEN: Your Honor, we'll --

23 THE COURT: Do you have a date when you're going to  
24 have to be there on those -- any of those pre-trials? We can  
25 adjourn it to the pre-trial conference in the Gardi litigation.

1 MR. LODEN: In the Gardi appeal? Yeah.

2 THE COURT: It's going to be within about sixty days,  
3 anyway.

4 MR. LODEN: I think that's reasonable.

5 THE COURT: All right. Okay. Thanks very much.

6 MR. LODEN: Thank you, Your Honor.

7 MR. STEPHENSON: Thank you, Your Honor.

8 (Whereupon these proceedings were concluded at 10:39 AM)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

RULINGS

	Page	Line
The Gardi Parties' Motion	6	17
for Leave to take		
Deposition of Marc S.		
Dreier Granted		

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true  
and accurate record of the proceedings.

---

DENA PAGE

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: September 24, 2010